Editor's note: appeal filed, Civ.No. 2-88-0017 (M.D. Tenn. Feb. 18, 1988)

CLEAR CREEK COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-406 Decided January 22, 1988

Appeal from a decision of Administrative Law Judge Joseph E. McGuire denying applications for review of Notice of Violation No. 80-2-10-52 and Cessation Order Nos. 80-2-10-25, 80-2-10-29, 81-2-10-2. Docket Nos. NX 1-49-R, NX 1-59-R.

Affirmed

1. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

Whether particular reclamation work is timely must be determined by taking into account the overall circumstances of a surface coal mining and reclamation operation.

APPEARANCES: Rudolph L. Ennis, Esq., Knoxville, Tennessee, for appellant; Paul A. Molinar, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for appellee.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Clear Creek Coal Company (Clear Creek) has appealed from a decision of Administrative Law Judge Joseph E. McGuire, dated January 18, 1985, denying its application for review of Notice of Violation (NOV) No. 80-2-10-52 and Cessation Order (CO) Nos. 80-2-10-25, 80-2-10-29, and 81-2-10-2, issued pursuant to section 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. S 1271(a)(3) (1982). The NOV and CO's involved the surface area of Clear Creek's underground Mine No. 2, located in Putnam County, Tennessee.

On October 29, 1980, when the mine had been inactive for approximately one year (Tr. 124), Inspector Joseph Strange of the Office of Surface Mining Reclamation and Enforcement (OSMRE) issued NOV No. 80-2-10-52 citing four violations, three of which are at issue herein. Violation 2 alleged that, upon completion of underground mining, Clear Creek had failed to return the affected surface areas to their approximate original contour (AOC), as required by the provisions of 30 CFR 717.14(a). In Violation 3, Clear Creek was charged with having failed to cover all toxic-forming, combustible material produced during its underground mining with a minimum of 4 feet of

nontoxic and noncombustible cover material, as required by 30 CFR 717.17(e). Violation 4 consisted of appellant's alleged failure to have established a diverse, effective, and permanent vegetative cover capable of self-regeneration and plant succession, in violation of 30 CFR 717-20(b). The areas originally involved in the alleged violations were the coal stockpile area on the north side of Meadow Creek, the treatment pond, the treatment pond dam, and the road leading to the pond (Exh. R-A). This was modified on December 30, 1980, to cover only the stockpile area (Exh. R-D). Clear Creek was ordered to abate Violation 2 by December 1, 1980, Violation 3 by December 30, 1980, and Violation 4 by January 26, 1981. Upon the subsequent failure of appellant to abate the conditions described in Violations 2, 3, and 4, Strange issued CO Nos. 80-2-10-25 (Violation 2), 80-2-10-29 (Violation 3), and 81-2-10-2 (Violation 4) (Exhs. R-C, R-E, R-F). Applications to review the CO's as well as the underlying NOV were duly filed and, on August 7, 1984, an evidentiary hearing on these consolidated matters was held before Judge McGuire in Knoxville, Tennessee.

The evidence disclosed that the area in the immediate vicinity of Mine No. 2 had been mined as early as 1946 or 1947 (Tr. 103). Clear Creek leased the land in 1964 for the purpose of conducting underground coal-mining operations and did so until approximately March 1979. At that time, the demand by the Tennessee Valley Authority for the coal produced at Mine No. 2 (which was very high in sulfur content) had declined to the extent that it was no longer profitable to continue mining operations.

In April 1979, Charles S. Higgins, a consulting engineer for Mining Consultants, Inc. (MCI), was retained by appellant to develop a drainage control and reclamation plan for the coal stockpile at the mine (Tr. 15-18). At that tine, the coal stockpile was estimated to contain 20 to 30 thousand tons of coal (Tr. 157-59). On August 31, 1979, MCI filed a reclamation plan with the Tennessee State Division of Water Quality Control (DWQC). 1/ The plan provided for removal of the coal stockpile, detoxification of the underlying base material, and reseeding the area with grass (Tr. 38; Exh. A-3). In the plan, a sedimentation pond exemption (sedimentation ponds are required by 30 CFR 715.17(a)) was requested because MCI believed construction of sedimentation ponds to be neither necessary nor prudent to meet effluent limitations and to protect Meadow Creek (Exh. A-3 at 7). The plan also provided for removal of the coal pile "as market conditions allow, over the next year."

Higgins testified that DWQC did not respond to MCI's plan until March 27, 1980, on which date Higgins was verbally informed that the plan was approved (Tr. 43). By letter dated April 7, 1980, DWQC informed Higgins that it agreed

1/ The evidence discloses that there was considerable initial confusion over which entity was the proper State regulatory authority. The Tennessee Division of Surface Mining did not then have jurisdiction over the surface effects of underground mines. Clear Creek did have a NPDES permit, however, and since the DWQC oversaw operations under that permit, it was eventually concluded that DWQC had the authority to approve the reclamation plan (Tr. 10-12, 39-40).

that the best long-term solution was the complete reclamation and revegetation of the site. However, it requested a revised monitoring schedule which would provide for the sampling of runoff during rainfall events (Exh. A-5). By letter of that same date, Higgins submitted a revision of the proposed monitoring schedule. This letter concluded with the statement that "[w]e understand that your letter of April 7 approves our plan and will begin implementation immediately." See Exh. A-6. However, by letter dated May 9, 1980, Garey L. Mabry, DWQC Program Manager, advised Clear Creek's president, Harry Talkington, in part as follows:

> It was our understanding following our meeting with Chuck Higgins last year, that the stockpile was to have been eliminated and reclamation was to have begun on the entire site last year [1979]. Since this has not been the case we are operating under the assumption that site preparation and seeding will be completed this year with supplemental work as needed continuing till the site is satisfactorily revegetated. In order to clarify this issue, please provide us with a schedule of your intended actions on this site within ten (10) working days of your receipt of this letter. This timetable should include projections for each major phase of the reclamation effort.

Exh. A 9.

Appellant alleged that neither Talkington nor Higgins ever received this letter. Higgins stated that he was first apprised of its existence in a conversation with Gordon Wofford of OSMRE after the NOV had been written in October 1980 (Tr. 47-48). He further testified that he received a copy from Wofford on October 30, 1980 (Tr. 52). Higgins stated that, at that time, he had assumed Talkington had received the letter and had merely failed to inform him of it. Later, in discussing the matter with Talkington after issuance of the first two CO's, Higgins stated that he discovered that Talkington had never received the May 1980 letter (Tr. 53-54). Talkington testified that he did not see this letter until a copy was sent to him by Higgins in January 1981 (Tr. 108).

In any event, by letter of January 26, 1981, directed to DWQC, Higgins responded to the May 9, 1980, letter and stated that the coal pile would be removed by March and that "initial reclamation efforts" would be completed by April 1981 (Exh. A-12). In April and May of 1981, OSMRE Inspector Strange conducted follow-up inspections of the site. He found that the area had been returned to AOC, that nontoxic material had been spread, and that seeding, fertilizing, and mulching had been completed so as to establish a cover of vegetation (Exh. A-18). On May 18, 1981, Strange terminated the three violations in issue as well as the CO's, based on his finding that the area had been reclaimed pursuant to the requirements of the pertinent regulations (Tr. 139, Exh. A-18).

On August 25, 1981, MCI wrote DWQC that it had complied with its plan. It requested that DWQC provide a statement that it had originally approved

the plan and that the work performed by MCI at the minesite conformed to the plan (App. Exh. A-15). By letter dated September 3, 1981, the Director, DWQC, responded in pertinent part

> I have reviewed the files and have determined to my satisfaction that the engineering plans of MCI, Inc., dated August 31, 1979, with revision of April 7, 1980, were approved by Garey Mabry, then of this Division. I am providing you this interpretation because I could not find in our files a copy of the plans stamped "Approved", and Mr. Mabry is no longer of this employment. However, it is obvious from Mr. Mabry's May 9, 1980, correspondence that he had at that tine approved the plans. I have personally inspected the site and it is my opinion that the work performed at Mine No. 2 is essentially in conformance with the specifications of the plan. [Emphasis in original.]

(App. Exh. 16).

Judge McGuire found that the NOV and the CO's were validly issued because appellant's reclamation responsibilities were governed by the Act and regulations and not by the State regulatory authority. The Judge found that appellant had a duty to remove the coal pile as contemporaneously as possible with its mining operations, so that reclamation could proceed. He noted that while Clear Creek had ceased mining in March 1979, removal of the coal stockpile, which had to precede other reclamation work, was not completed until almost 2 years later. Thus, Judge McGuire concluded that appellant had failed to reclaim the affected surface area as contemporaneously as possible as mandated by section 102(e) of SMCRA, 30 U.S.C. § 1202 e (1982). He therefore denied the various applications for review.

On appeal, Clear Creek does not dispute the factual assertion of OSMRE. Rather, it simply contends that, because its reclamation activities were proceeding according to a State approved plan and schedule, the NOV and CO's were improperly issued and should be vacated. In support, appellant cites Excello Coal Corp. v. William Clark, No. CIV-3-88-902 (E.D. Tenn. Dec. 27, 1984).

[1] While appellant argues at considerable length that issuance of the NOV constituted a repudiation by OSMRE of the agreement between DWQC and appellant, the ultimate question presented by this appeal is whether appellant was in compliance with the initial performance standards. As the Interior Board of Surface Mining and Reclamation Appeals (IBSMA) noted, "compliance with a state mining permit does not change obligations under Federal law and does not excuse noncompliance with the initial performance standards." Mountain Enterprises Coal Co., 3 IBSMA 338, 346, 88 I.D. 861, 865 (1981). See also Cedar Coal Co., 1 IBSMA 145, 86 I.D. 250 (1979). As we will discuss below, the evidence establishes that appellant's interpretation of the time-frame in which the coal stockpile was to be removed and reclamation activities begun did not accord with the interpretation espoused by the DWQC. Even if it had, however, appellant was still obligated to "reclaim the surface areas as contemporaneously as possible with the surface coal mining operations." 30 U.S.C. § 1202(e) (1982). Thus, 30 CFR 715-13(a) provides that "[a]ll disturbed areas shall be restored in a timely manner."

In Old Home Manor, 3 IBSMA 241, 88 I.D. 737 (1981), the Board noted that "whether particular reclamation work is 'timely' must be determined taking into account the overall circumstances of a surface coal mining and reclamation operation." Id. at 248, 88 I.D. at 741. In this case, mining operations at Mine No. 2 shut down in March 1979. When the OSMRE inspector visited the site in October 1980, 19 months later, it is undisputed that a coal stockpile containing 20,000 to 30,000 tons of coal remained at the site. The continued existence of this coal stockpile necessarily precluded other reclamation work at the site. Even giving due consideration to the economic conditions which led to the closing of the mine as well as possible uncertainties engendered as to whether the reclamation plan had been approved by DWQC, it is impossible to conclude that reclamation was occurring "as contemporaneously as possible," as required by SMCRA. Thus, under the circumstances of this case, issuance of the NOV and the subsequent CO's was justified and the decision of Judge McGuire denying the applications for review must be affirmed. 2/

While Clear Creek asserts that it was acting in conformity with a State-approved plan, the facts of record show that Clear Creek did not comply with that plan, at least as that plan was interpreted by DWQC. Thus, after approving Clear Creek's reclamation plan in April 1980, DWQC wrote Talkington in May, noting that "[i]t was our understanding following our meeting with Chuck Higgins last year, that the stockpile was to have been eliminated and reclamation was to have begun on the entire site last year." (Emphasis supplied.) The letter continued: "Since this has not been the case we are operating under the assumption that site preparation and seeding will be completed this year [1980] with supplemental work as needed continuing till the site is satisfactorily revegetated" (Exh. A-9). Regardless of whether or not Talkington actually received this letter, this document shows that DWQC was of the view that the stockpile would be removed, the surface detoxified, and the land seeded by the end of the year. When Strange visited the site at the end of October and saw that the stockpile still remained, he issued the NOV. It was clear at that time that complete reclamation could not be accomplished by year's end. Subsequent events bore this out, since it is undisputed that the stockpile was not removed until after January 1981, nor was reclamation completed until after that date. This is simply not a case where the State regulatory authority approved one course of action and OSMRE subsequently refused to abide by that approach. Appellant's citation of Excello Coal Corp. v. William Clark, supra, is clearly inapposite. 3/

2/ While we hold that appellant's economic difficulties in disposing of the coal stockpile are not germane to the question of whether it operated in compliance with SMCRA, they may be relevant insofar as the assessment of a civil penalty is concerned. See 30 CFR 722-17(c) and 30 CFR 723.16(a).

3/ Moreover, there was nothing inconsistent between DWQC's approval of the reclamation plan and OSMRE's requirement that the stockpile be removed and seeding occur by January 1981. Even assuming appellant is correct in its interpretation of when the coal stockpile was required to be removed (but see discussion in text, infra), there was no provision of the approved reclamation plan which precluded removal of the coal by December 1980.

Appellant's reliance on the September 3, 1981, letter, which it received from DWQC, is simply misplaced. As noted above, the letter stated that "the work at Mine No. 2 is essentially in conformance with the specifications of the plan: (Exh. A-16). But, by this tine, OSMRE was in agreement that the area had been reclaimed. Indeed, it had terminated the NOV and the CO's on May 18, 1981. Nothing in this letter, however, goes to the critical question whether or not the reclamation work was timely completed.

Appellant essentially relies on the fact that its plan specifically provided that "[i]mplementation can begin upon receipt of your approval of this plan" (Exh. A-3 at 7). Thus, it argues that the year time-table which the plan called for did not commence until April 7, 1980, when it obtained approval. Higgins argued that it was deemed prudent to wait for approval of the reclamation plan before commencing any activities (Tr. 91). However, not only did DWQC apparently not interpret the plan this way (see Exh. A-9), it is obvious that removal of the coal stockpile was not subject to approval of the reclamation plan. Indeed, the August 1979 plan had stated "[tlhe coal stockpile will be removed, as market conditions allow, over the next year" (Exh. A-3 at 3). This activity was not preconditioned on approval of the reclamation plan and clearly was not tied with the succeeding discussion of grass plantings where it was expressly noted the "[p]ursuant to the Division's approval, the first such plantings will be undertaken this fall." Id. (emphasis supplied). Regardless of what appellant contends was its understanding, the May 1980 letter from DWQC to Talkington clearly was premised on the view that removal of the coal stockpile had previously been approved, needed no further approval, and was thus independent of the approval of the reclamation plan.

Moreover, the failure of Higgins to take any action after the NOV was written, even after he had been provided with a copy of the May 1980 letter on October 30, 1980, is simply unexplained. Higgins testified that he did nothing "[blecause it had been our understanding that once that reclamation plan had been approved by the State in April, that we had a year to reclaim the site" (Tr. 53). The problem with this explanation, of course, is that the May 9, 1980, letter clearly required that "site preparation and seeding * * * be completed this year." (Emphasis supplied.) At a minimum, this should have put Higgins on notice to inquire of DWQC. No such inquiries were made. We must conclude, therefore, that the evidence clearly establishes that Clear Creek did not proceed to reclaim the area in conformity with the time-table proposed by Clear Creek and agreed to by DWQC, much less "as contemporaneously as possible" as directed by 30 U.S.C. S 1202(e) (1982).

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fn. 3 (continued)
Appellant chose, for economic reasons, not to remove the coal from April through December at a rate which would have exhausted the stockpile. This choice of appellant was not dictated by any terms in the approved plan. It could have chosen to remove the coal more expeditiously. This, it did not do.

We note that, with its pleadings, appellant filed a request for oral argument. In light of our review of the record, we see no useful purpose which might be served by the grant of oral argument and it is hereby denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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James L. Burski
Administrative Judge

We concur:

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John H. Kelly
Administrative Judge

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R. W. Mullen
Administrative Judge